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No. 91-2021

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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LAMB'S CHAPEL and JOHN STEIGERWALD,
*Petitioners,*

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY TO BRIEFS IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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No. 91-2024

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LAMB'S CHAPEL and JOHN STEIGERWALD,
*Petitioners*,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
*Respondents*.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY TO BRIEFS IN OPPOSITION

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In this case a public school district, which opens its facilities (after hours) to non-school community groups for every "civic, social and recreational" purpose, has denied permission to an otherwise eligible group solely because that group wishes to show a film containing a *religious* perspective. The question presented is whether a government body—here, a school district—may designate a forum for speech by private citizens for virtually all noncommercial purposes except religious speech.

The decision of the Second Circuit in this case is in sharp and direct conflict with the decisions of at least four other federal circuits. This Court should grant review to resolve this conflict.

**Background**

The material facts of this case are undisputed.

The respondent Center Moriches Union Free School District (CMUFSD) maintains an explicit policy of discrimination against any otherwise eligible group that wishes to use CMUFSD facilities for what CMUFSD deems to be "religious purposes": "The school premises shall not be used by any group for religious purposes." Rules and Regulations for Community Use of School Facilities (Rules & Regs.) #7 (App. 57a). The CMUFSD denied permission to Lamb's Chapel[1] (a church) and John Steigerwald (pastor of the church), the petitioners in this case (hereinafter collectively, "Lamb's Chapel"), to use school facilities to show a film series on contemporary family issues. Pet. at 5-7. The series featured noted commentator Dr. James C. Dobson, president of Focus on the Family. Pet. at 6 & n.3. A CMUFSD official explained that the film series "does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 6d, 7b. *See* Pet. at 6-7.

Neither CMUFSD nor the intervenor respondent New York State Attorney General's Office (State AG) question the eligibility of Lamb's Chapel, as a community organization, to use school facilities. *Accord* Tr. 69-70 ("church groups" not *per se* ineligible). Nor does either respondent identify any bar to the use of school facilities to show a film, open to the public, addressing family issues. *CMUFSD's sole objection is to the religious perspective of the film series.* This is undisputed. *See* Pet. at 5-7.

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[1] Lamb's Chapel is a not-for-profit corporation. It has no parent company or subsidiaries.



**Public/private purposes**

CMUFSD tries to justify its exclusion of Lamb's Chapel by drawing a distinction between use of school facilities for "private purposes" and use for "public purposes." *See* Brief of Defendants-Respondents in Opposition (CMUFSD Brief) at 3, 7, 8. The court below embraced no such theory. But even assuming that a "public/private purpose" distinction were coherent and capable of equitable administration in this particular context, this classification is of no use to CMUFSD here. The film series Lamb's Chapel planned to show was to be open to the general public, Tr. 11-12; Plaintiffs' Exs. 6a, 7a, and the topic—contemporary family issues—is clearly of "public" interest. CMUFSD does not argue that addressing family issues is somehow a less "public" purpose than a meeting of the Holiday Beach Property Owners Association or the Manorville Humane Society, which CMUFSD allows, Pet. at 4. Ultimately, then, CMUFSD can do no more than assert an unprecedented *per se* equation of a "religious" use with a "private" use, CMUFSD Brief at 8.

**Circuit conflict**

CMUFSD has denied Lamb's Chapel access on terms equal with all other community groups solely because of the "religious purpose" of Lamb's Chapel's planned film presentation. CMUFSD explicitly concedes that the forum it has "established" is "not open to religious expression," CMUFSD Brief at 2. The Second Circuit sustained this explicit discrimination against religious speech, placing the Second Circuit in direct conflict with the decisions of at least four other federal circuits. *See* Pet. § I (conflict on merits with First, Third, and Fifth Circuits);[2]

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[2] *See Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978); *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989).

*id.* § II (conflict on "public forum" issue with First, Third, Fourth, and Fifth Circuits).[3] *No* case outside of the Second Circuit has departed from the uniform judicial condemnation of the censorship of free expression, including religious expression, in school facilities made available as a forum for outside use. *See* Pet. at 13, 15-16 (listing additional cases in Seventh and Eighth Circuits and district court cases in Sixth, Ninth, and Tenth Circuits).

The respondents CMUFSD and the State AG fail in their attempts to distinguish away this mass of contrary precedent.

In essence, both respondents make the claim that this case is "different," Brief for Respondent Attorney General in Opposition to the Petition for Certiorari (AG Brief) at 10, because access to CMUFSD facilities is "selective," *id.* at 7, and available only for "certain limited prescribed uses," CMUFSD Brief at 4. These characterizations mask the undisputed factual reality of the situation: there are no significant limitations on the noncommercial community use of CMUFSD facilities.

CMUFSD identifies a New York state statute as the source of the supposed "limitations" on the use of school facilities. *See* N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1992) (App. 52a-55a). But, as explained in the petition for certiorari, this statute explicitly authorizes the after-school community use of public school facilities for "holding social, civic and recreational meetings and entertainments" which are "non-exclusive and open to the general public," *id.* § 414(1)(c) (App. 53a). CMUFSD

[3] *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (3d Cir. 1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978).



itself likewise authorizes "social civic, or recreational use" of school facilities after hours by community groups. Rules & Regs. #10 (App. 57a).

CMUFSD concedes that state law and its own policy permit after-school community use of school facilities for all "cultural and educational activities consistent with . . . the welfare of the community," CMUFSD Brief at 3. CMUFSD has welcomed everything from a humane society to a property owners association, a dance recital, a gospel singing performance, and numerous other non-school uses. Pet. at 4-5. Neither CMUFSD nor the State AG has identified *any group* (aside from Lamb's Chapel) *ever denied access* by CMUFSD.

CMUFSD claims not only to bar religious speech but also to impose a hodge-podge of restrictions on access to its facilities for certain nonreligious speech as well. CMUFSD, however, has seriously misrepresented the law and the facts of this case:

—CMUFSD claims that state law forbids labor unions from using school facilities. CMUFSD Brief at 7, 10. CMUFSD identifies no statutory basis for this supposed restriction, and in fact CMUFSD has permitted union use of school facilities. *See* Plaintiffs' Ex. 21 (calendar of uses of CMUFSD facilities, entry for Oct. 22, 1988: "Union Meeting (Custodial Dept.)").

—CMUFSD claims that state law forbids access for charitable fundraising. CMUFSD Brief at 10. State law contains no such prohibition; on the contrary, the relevant statute explicitly authorizes collection of funds for "an educational or charitable purpose," § 414(1)(d) (App. 53a). Moreover, CMUFSD has permitted outside groups to conduct fundraisers in school facilities. *E.g.*, Plaintiffs' Ex. 20 (Manorville Humane Society Chinese Auction: applicant's stated purpose was "[t]o raise funds for the Manorville Humane Society's work"); Plaintiffs' Ex. 22 (Moriches Pa-Qua-Tuck Squaws Chinese Auction:

applicant stated that "money made goes [to] Camp Paquatuck").

—CMUFSD claims that state law forbids "meetings . . . which charge admission." CMUFSD Brief at 10. But in fact both state law and CMUFSD policy explicitly authorize such meetings, *see* § 414(1)(d) (App. 53a); Rules & Regs. #11 (App. 57a), and CMUFSD has permitted users of school facilities to charge admission, *e.g.*, Plaintiffs Exs. 9a, 12a, 14 (concerts and cultural program).

In short, neither state law nor CMUFSD policy and practice impose any meaningful limitations on any noncommercial uses *except those which present a religious perspective* on otherwise unobjectionable subject matter.[4]

The efforts of the State AG to distinguish away the conflicting decisions of the other circuits likewise fails:

—The State AG emphasizes that in the contrary cases, access was available on a "first-come, first-served" basis. AG Brief at 8, 11. But access to CMUFSD facilities follows a similar "first-come, first-served" policy. *See* Tr. 67 (testimony of CMUFSD business manager), 131 (testimony of CMUFSD superintendent).

—The State AG notes that in the contrary cases, school districts allowed access to a "wide range of community groups." AG Brief at 8 (quoting Third Circuit opinion); but the same is clearly true here, Pet. at 4-5.

[4] CMUFSD policy explicitly forbids use of school facilities "for religious purposes." Rules & Regs. #7. While state law does not explicitly discriminate against religious speech, an intermediate state appellate court has construed § 414 of the state education law to contain a prohibition on religious uses. *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978). The constitutional validity of these parallel bans on religious speech is precisely the issue presented here.



—The State AG points out that in at least one of the contrary decisions, no group had been denied access except for the plaintiff in that case. AG Brief at 10-11; but neither the State AG nor CMUFSD have identified any group other than Lamb's Chapel which was ever denied access to CMUFSD facilities.

The inescapable fact is that the decision of the Second Circuit cannot be reconciled with the contrary decisions of other federal courts of appeals that have addressed situations factually indistinguishable from the present case. Pet. §§ I, II. Lamb's Chapel repeatedly called the attention of the Second Circuit to the contrary decisions of sister circuits, *see* Brief of Appellants at 24-27, 41; Reply Brief of Appellants at 3; nevertheless, the opinion of the court below does not even cite, must less attempt to distinguish, the conflicting decisions of these other circuits. The Second Circuit has therefore become a law unto itself on the question of equal access to school facilities for religious speech. *See* 959 F.2d at 386-87 (App. 9a-12a) (relying upon line of Second Circuit decisions); *id.* at 387 (App. 11a) (citing *stare decisis* as precluding reexamination of Second Circuit precedents).

As explained in further detail in the petition for certiorari, CMUFSD's policy of censorship of religious speech conflicts not only with the decisions of other circuits but also with the decisions of this Court governing access both to public and nonpublic fora. *See* Pet. §§ I-III; *see also id.* § IV (conflict with Establishment Clause jurisprudence of this Court).

The State AG has frankly defended the exclusion of Lamb's Chapel on the basis that the proposed film series "presented a Christian perspective," AG Brief at 14 (quoting opinion of Second Circuit). Such anti-religious viewpoint discrimination against speech by private citizens is intolerable under the First and Fourteenth Amendments to the Constitution.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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